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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1975

NO. 75 - 15

UNIVERSAL ATHLETIC SALES COMPANY,
Petitioner

v.

DONALD E. PINCHOCK, et al.,
Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW AND JURISDICTION

The basis for this Court's jurisdiction are set forth in the petition (Pet. 2) and the opinions below are set forth in the appendices to the petition (Pet. App. 1-45).

QUESTIONS PRESENTED

The Questions presented in petitioner's brief do not accurately state the issues for review in that they are not "expressed in the terms and circumstances of the case" as required by U.S. Sup. Ct. R 23.1 (C). Pursuant to U.S. Sup. Ct. R 40.3, respondents present the following Questions.

Questions Presented.

1. Whether the Court of Appeals' action in this case in vacating the summary judgment in petitioner's favor was in any way subject to Fountain v. Filson 336 U.S. 681 (1949) where the vacating order was not entered on a new issue, but on the issue of infringement by an accused chart of a copyrighted chart fully litigated before the District Court.

2. Whether the Court of Appeals can on the issue of infringement, whose resolution categorically determines the outcome of the case, enter judgment for respondents based on its finding, after comparing the copyrighted and accused charts, that there exists no substantial similarity between them.

STATEMENT OF THE CASE

Petitioner's **Statement of the Case** involves matter not pertinent to the issue presented. The following Statement is accordingly submitted.

Petitioner, a manufacturer of weight-training machines, sued respondents, including Super Athletics, a competitor, and its officers, for infringement of wall charts used with the machines. The suit was filed in 1971. Petitioner took the depositions, over a period of two years, of Super Athletics' officers, respondents Brodsky and Salkeld, and of Super Athletics' employees Hudson and others, and submitted lengthy interrogatories which Super Athletics answered. Salkeld's testimony was taken in 1971 while he worked for Super Athletics and in 1972 after he was fired "and sought comfort in the tents of the enemy".

In early 1973 petitioner first moved for a preliminary injunction and later moved for summary judgment. Petitioner based its motions on the depositions, on the answers to the interrogatories, on affidavits of petitioner's officers and employees and of William Farrell, a distributor, and on comparison charts submitted by petitioner, in which the copyrighted and accused works were dissected (Pet. App. 4). Based on this testimony, both motions were granted (Pet. App. 16-24) (Pet. App. 39-45). The Memorandum granting the motion for summary judgment incorporates by reference the opinion granting the preliminary injunction (Pet. App. 40). Contrary to petitioner's Question 2 (Pet. 3), this testimony did include evidence on the "history, originality, and substance of the works" and was considered by the District Court. This testimony was submitted in the form of affidavits in support of a motion for the preliminary injunction. In the opinion on the preliminary injunction, the District Court refers to "a comprehensive appendix with affidavits", etc. (Pet. App. 16). During the contempt proceedings, William Farrell testified on the value of the charts, the cost of preparation and other matters.

All this testimony was of record and available to the Court of Appeals. What is more significant, respondents' appeal brief was supplemented by two volumes of appendix aggregating 213 pages, and a separate volume of 13 Exhibits including charts prepared by counsel for petitioner. These appendices included material added at petitioner's request, notably the testimony of Farrell as to the cost and value of the copyrighted charts. Copious quotations from the depositions of Salkeld, Brodsky and Hudson were included. This material was referred to in detail in petitioner's brief.

In its brief respondents admitted access, not copying. Hudson did not admit copying, but testified he used petitioner's works as a guide. Indeed during deposition, petitioner's counsel, Dalgarn paraphrased Hudson's testimony as indicating that Hudson used petitioner's material "as a guide". The evidence which petitioner produced of the copying by Hudson on which the District Court relied in asserting that Hudson admitted copying (Pet. 42) was a portion of a preliminary chart made by Hudson and Salkeld which was never published or distributed. Salkeld was a disgruntled employee who was fired by respondent, Super Athletics. His testimony given in 1971, before he was fired, is in conflict with his testimony in 1972, after he was fired. In fact, Salkeld never admitted copying; he attested that the wording of his work "is different both in sequence and in phrasing."

On appeal the Court of Appeals had before it the copyrighted and accused charts in their form as distributed and black and white copies of these charts included in respondents' brief. The Appeals Court concluded, based on its observation of the charts, that the copyrighted and accused works are not substantially similar and that there is no infringement (Pet. App. 6, 7, 8, 9, 10, 11). Infringement being the sole and ultimate issue determinative of the case, the Circuit Court reversed the District Court vacating its judgment.

ARGUMENT

I

Petition not in Compliance with U.S. Sup. Ct. R 19

Petitioner does not cite under which of the reasons of Rule 19.1(b) the petition is submitted. Petitioner cites Fountain v. Filson supra. This case expressly points out that in awarding the Filson's $6,000, the Appeals Court raised a "new issue as to which the opposite party had no opportunity to present a defence" (pp 682, 683). Here the sole issue, both before the District Court and the Court of Appeals, was whether or not respondents' accused work infringes petitioner's copyrights. On this issue petitioner presented elaborate and lengthy proof in support of its motion for summary judgment. The copyrighted and accused charts were of record and the Court of Appeals reversed the District Court "based on an observation of the charts" (Pet. App. 6). The Court of Appeals remarked that it "is in as good a position to determine the question (of infringement) as is the district court" (parenthesis added). Once having ruled that there is no infringement, it would have been futile for the Court of Appeals to remand the case for a new trial. There was nothing to try; there was no "new issue".

ARGUMENT

II

SOLE CRITERION OF COPYRIGHT INFRINGEMENT IS WHETHER COPYRIGHTED WORK AND ACCUSED WORK ARE SUBSTANTIALLY SIMILAR

Judged by its Question 2, Petitioner asks that it be given the opportunity again to present to the Courts its evidence on copying and on the origin of the charts. It seems to be petitioner's view (argued at the hearing before the Court of Appeals) that evidence of copying alone establishes copyright infringement regardless of what product results from the copying. Evidence of copying, assuming for the purpose of argument only that it is proved, only establishes access; on infringement the works speak for themselves. As pointed out by Judge Garth at the hearing, based on petitioner's theory, a copy of a picture of a person by Salvatore Dali, in which the image had four arms and six legs, would constitute infringement of the picture. In fact, the sole test of copyright infringement is whether the ultimate product, the accused work is substantially similar to the copyrighted work. And on this issue the Circuit Court spoke unequivocally in favor of respondents.

CONCLUSION

Under consideration here is a common garden-variety copyright case decided by the Court of Appeals by comparing the accused and copyrighted work in line with the decisions of this Court and innumerable decisions of other Federal courts, some of which are cited in the opinion of the Court of Appeals (Pet. App. 5, 6, 7). The decision of the Appeals Court was unanimous and rehearing by the court in banc was refused, after submission to the judges who rendered the decision and all other available judges of the third circuit (Pet. App. 15). Respondents pray that this petition be denied.

Respectfully submitted,

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